The meeting was called to order at 10.15 a.m.

Tribute to the memory of Doudou Thiam, former member, Chairman and Special Rapporteur of the International Law Commission

1. **Mr. Galicki** (Chairman of the International Law Commission) and the **Chairman** paid tribute to the memory of Doudou Thiam and expressed their condolences to the delegation of Senegal.

2. *At the invitation of the Chairman, the members of the Committee observed a minute of silence.*

3. **Ms. Diop** (Senegal) said that her delegation was deeply moved by the minute of silence observed by the Committee in honour of Mr. Doudou Thiam. The Chairman of the International Law Commission had described Mr. Thiam as its dean and memory. She could testify that he had also played that role within his country as Senegal's first Minister of Foreign Affairs and an early advocate of women's advancement. The Committee's condolences were much appreciated and would be transmitted to the Head of State of Senegal.

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (A/54/10 and Corr.1 and 2, A/CN.4/493)

4. **Mr. Galicki** (Chairman of the International Law Commission), introducing the report of the Commission (A/54/10 and Corr.1 and 2), said that his statement at the current meeting would focus on chapters I to IV. Chapter I described the membership and internal structure of the Commission, and chapter II provided a brief overview of the work done by the Commission, while chapter III, in response to the request of the Sixth Committee, highlighted the issues on which the views of Governments would be particularly helpful to the Commission. In connection with the last of those issues, protection of the environment, he noted that although the Commission had requested written comments, oral comments would also be welcomed.

5. The first substantive chapter of the report was chapter IV, on the topic entitled "Nationality in relation to the succession of States". The Commission had completed its second reading of the draft articles on nationality of natural persons in relation to the succession of States, and had decided to recommend to the General Assembly the adoption of the draft articles in the form of a declaration. The texts of the draft articles, with commentaries, are reproduced in paragraph 48 of the report. The scope and application of the articles was limited to the nationality of individuals and did not extend to the nationality of legal persons.

6. The draft articles were divided into two parts: part I applied to all categories of succession of States and part II contained specific provisions applicable in four different categories of succession of States. The Commission had duly taken into account the practice of States during the process of decolonization for the purpose of the elaboration of the provisions in part I. Part II dealt with four specific categories of succession, and it was assumed that those provisions would be applicable, *mutatis mutandis*, in any remaining case of decolonization in the future.

7. The preamble indicated the *raison d'être* of the articles: the concern of the international community as to the resolution of nationality problems in the case of a succession of States. Although nationality was governed essentially by national legislation, the competence of States in that field could be exercised only within the limits set by international law. The preamble further affirmed that, in matters concerning nationality, the legitimate interests of both States and individuals should be taken into account. The sixth preambular paragraph concerned the human rights of persons whose nationality might be affected following a succession of States. The eighth paragraph emphasized the need for the codification and progressive development of international law in the field of nationality of natural persons in relation to the succession of States.

8. Article 1 was a key provision, its core element being the application of the right to a nationality embodied in article 15 of the Universal Declaration of Human Rights in the particular context of a succession of States. He noted that the article could not be read in isolation from the other draft articles and drew particular attention to paragraph (5) of the commentary.

9. With regard to article 2, on use of terms, the definitions in subparagraphs (a), (b), (c), (e) and (g) were identical to those contained in article 2 of the two Vienna Conventions on the Succession of States, whereas those in subparagraphs (d) and (f) had been deleted by the Commission.

10. Article 3, which was based on the relevant provisions of the two Vienna Conventions, explicitly limited the application of the draft articles to successions of States occurring in conformity with international law. Questions of nationality which could arise in situations such as illegal annexation of territory were not covered, but the provisions were without prejudice to the right of everyone to a nationality.

11. Article 4 referred to the prevention of statelessness, which was to be achieved by means of the application of the entire set of draft articles, and in particular through coordinated action of the States concerned.

12. Article 5 addressed the problem of the time-lag between the date of the succession of States and the adoption of legislation or the conclusion of a treaty between the States concerned on the question of nationality. It was presumed, subject to assessment in the overall context of the draft articles, that on the date of the succession of States, the successor State attributed its nationality to persons concerned who were habitual residents of the territory affected.

13. Article 6 dealt with the legislation on nationality and other connected issues, the main focus being the timeliness of internal legislation. "Connected issues" referred to the right of residence, the unity of families, military obligations, social benefits and other matters intrinsically consequential to the change of nationality upon a succession of States.

14. Article 7 provided for the retroactive effect of the automatic attribution of nationality or the acquisition thereof, provided that the persons concerned would otherwise be stateless during the period between the date of the succession of States and the date of attribution or acquisition. He drew particular attention to paragraph (3) of the commentary concerning the use of the expression "attribution of nationality".

15. Article 8 referred to exceptions to the obligation and power of the successor State to attribute its nationality.

16. Article 9 dealt with the renunciation of the nationality of another State as a condition for attribution of nationality, and article 10 with the loss of nationality upon the voluntary acquisition of the nationality of another State, without addressing the temporal element of when the loss of nationality should become effective or the question of the voluntary acquisition of the nationality of a third State.

17. Paragraph 1 of article 11 set out the requirement of respect for the will of the person concerned where such person was qualified to acquire the nationality of two or several States concerned. There was no strict obligation to grant a right of option to that category of persons, although articles 20, 23 and 26 referred to the categories of persons entitled to such a right in specific categories of succession of States. Paragraph 2 highlighted the function of the right of option in eliminating the risk of statelessness. The term "appropriate connection", which should be interpreted in a broader sense than the notion of "genuine link", had been used because the Commission attached paramount importance to the prevention of statelessness, which in the case in question superseded the strict requirement of an effective nationality. Paragraphs 3 and 4 referred to the consequences of the exercise of the right of option with regard to the obligations of the States concerned; paragraph (12) of the commentaries was of particular interest in that regard. The requirement for a reasonable time limit set out in paragraph 5 was intended to ensure an effective exercise of the right of option.

18. Article 12 dealt with the problem of family unity. While it was desirable to enable members of a family to acquire the same nationality upon a succession of States, it was not a requirement, although States had a general obligation to eliminate any legislative obstacles to families living together as a unit. The term "appropriate measures" was intended to exclude unreasonable demands on the part of persons concerned, and the Commission's views concerning the question of the concept of "family" were set out in paragraph (6) of the commentary.

19. Article 13 referred to the issue of children born to persons concerned after the date of succession of States. Such children had the right to the nationality of the State in whose territory they were born. The application of the article did not have any further limitation in time, in order to avoid statelessness.

20. Article 14 dealt with the status of habitual residents. Paragraph 2 was intended to ensure the effective restoration of the status of such residents in the specific case where the succession of States was the result of events leading to the displacement of a large part of the population. The Commission had felt that in the light of recent experience, it was desirable to address the problem of that vulnerable group.

21. Article 15 prohibited discrimination on any ground in matters of nationality in relation to a succession of States.

22. Article 16 applied the principle embodied in article 15, paragraph 2, of the Universal Declaration of Human Rights; it was intended to prevent abuses occurring in the process of the application of any law or treaty which, in themselves, were consistent with the draft articles.

23. Article 17 was intended to ensure that the procedure followed with regard to nationality matters in cases of succession of States was orderly. Article 18 dealt with the exchange of information, consultation and negotiation between the States concerned, with a view to identifying in advance the problems which might arise in the case of a succession and preventing or minimizing any negative consequences.

24. Article 19 dealt with the situation of States other than the State which had attributed its nationality. It safeguarded the right of those States not to give effect to a nationality attributed by a State concerned in disregard of the requirement of an effective link, and also required that such treatment be for the benefit of the persons concerned, and not to their detriment.

25. Part II was divided into four sections devoted to specific categories of succession of States, namely the transfer of part of the territory, the unification of States, the dissolution of a State and the separation of part or parts of the territory.

26. Section 1 of part II consisted of article 20, which applied in the case of cessions of territory between two States on a consensual basis and was based on the prevailing State practice.

27. Section 2 of part II also consisted of one article, article 21, which dealt with the attribution of the nationality of the successor State in those cases where a unification of States had occurred. The provision in article 21 reflected State practice and, in the view of the Commission, embodied a rule of customary international law.

28. Section 3 consisted of articles 22 and 23 and applied to the case of the dissolution of a State, as distinguished from the case of separation of part or parts of the territory.

29. The core body of nationals of each successor State was defined in article 22, paragraph (a), by reference to the criterion of habitual residence. Paragraph (b) set out rules for the attribution of the nationality of a successor State to persons concerned having their habitual residence outside its territory.

30. Article 23, paragraph 1, provided for the right of option of persons concerned who were qualified to acquire the nationality of two or more than two successor States. Paragraph 2 dealt with persons concerned who had their habitual residence in a third State and who were not covered by the provisions of article 22, paragraph (b).

31. Section 4 consisted of articles 24 to 26 and applied to the case of separation of part or parts of the territory. Such a case must be distinguished from the case of the emergence of newly independent States, although the substantive rules in articles 24 to 26 could be applied, *mutatis mutandis*, in any case of emergence of a newly independent State.

32. Article 25, paragraph 1, dealt with the withdrawal of the nationality of the predecessor State as a corollary to the acquisition of the nationality of the successor State.

33. Article 25, paragraph 2, listed the categories of persons concerned who were qualified to acquire the nationality of the successor State but from whom the predecessor State should not withdraw its nationality unless they opted for the nationality of the successor State.

34. Article 26 covered both the option between the nationalities of the predecessor State and a successor State as well as the option between the nationalities of two or more successor States.

35. The Office of the United Nations High Commissioner for Refugees (UNHCR) had found the text prepared by the Commission to be very useful for its work. In a letter addressed to the Commission, the High Commissioner had stated that problems relating to nationality following the succession of States had been of major concern to UNHCR in the past decade, and that many of its programmes in newly independent States centred on that issue.

36. The Commission had decided to recommend to the General Assembly that, with the adoption of the draft articles on nationality, the work of the Commission on the topic should be considered concluded. In the absence of positive comments from States, the Commission had concluded that States were not interested in the study of the second part of the topic.

37. **Mr. Longva** (Norway), speaking on behalf of the Nordic countries, said that the submission of the draft articles on nationality in the form of a declaration (A/54/10, chap. IV) illustrated the Commission's ability to complete its consideration of a topic in a timely fashion. The Nordic countries were of the view that the Commission was functioning in accordance with its mandate and that it had benefited from a continuing dialogue with the Sixth Committee.

38. Referring to chapter X of document A/54/10, he said that inadequate attendance at the Commission's meetings had long been an issue of concern. The Nordic countries shared the Commission's view that split sessions might improve the situation by allowing for extended inter-sessional deliberations, thereby enhancing the productivity of the second part of a split session. It was important, however, that the report of the Commission should be issued well in advance of the Sixth Committee's meetings.

39. Further improvements depended largely on the ability of Governments to respond to the Commission's requests for written comments or for questionnaires to be completed. The resource constraints faced by smaller countries, in particular, might affect their ability to respond. The comments of

several Governments were in fact submitted during the meetings of the Committee. While acknowledging that written contributions might be more useful to the Commission, the Nordic countries were concerned that oral statements made in the Committee did not always get the attention they deserved. All opinions deserved equal consideration, regardless of the form in which they were presented.

40. Furthermore, the Commission's requests for comments by Member States should be formulated as precisely as possible. States might have more difficulty in preparing responses when the requests appeared to be too broad. It might also be productive for Governments to initiate national consultations with organizations and individual experts on international law.

41. The Nordic countries supported the idea of strengthened cooperation between the Commission and other bodies concerned with international law, as exemplified by the enhanced dialogue between the Commission and the Committee of Legal Advisers on Public International Law of the Council of Europe. The Nordic countries noted with satisfaction the exchanges held between the Commission and the International Court of Justice. The Court and the Commission had distinct but mutually reinforcing functions.

42. The Commission's consultations with scientific institutions, individual experts, international or national organizations and other bodies within and outside the United Nations were equally important for the progressive development and codification of international law, and should include an exchange of views and experience with the relevant contributors to international law.

43. While the Commission should remain the main body for discussion of the general principles of international law, its time should not be spent on issues that were dealt with in more specialized forums.

44. The Nordic countries considered that the primary rules had now been codified in the major fields of international law, including treaty law, diplomatic and consular law, human rights law, the law of the sea and humanitarian law applicable in armed conflicts. The time was right for achieving substantive progress on the secondary rules concerning State responsibility. The focus should, moreover, be on practical needs rather than on theoretical debates. Topics such as diplomatic protection were ripe for codification. It should be recognized that the completion of the current agenda within the quinquennium would require most of the Commission's attention, leaving it less time to assist other bodies. Any extra time should be set aside to enable the Commission to render such assistance, rather than taking on new tasks.

45. In general, the Nordic countries recommended that further elaboration of environmental rules should be postponed for the time being. The topics of international liability for injurious consequences arising out of acts not prohibited by international law and of State responsibility were closely related to environmental protection, a subject which was being dealt with in various specialized bodies where solutions were tailored to specific environmental problems. The Commission should continue to focus on general rather than specialized fields of international law.

46. The Nordic countries took note with interest of the report of the Commission's Working Group on Jurisdictional Immunities of States and their property (A/54/10, annex). The report would be the basis for consideration of the topic by the Working Group of the Sixth Committee. The question of codification of the law of State immunity obviously remained controversial. The Nordic countries would refer to that question and to the timing of a possible diplomatic conference in the Working Group. Admittedly, a convention on State immunity was a viable long-term goal. The existing draft, however, raised a number of questions requiring further discussion. Among other things, the traditional division between *acta iure imperii* and *acta iure gestionis* was not reflected in the proper way.

47. **Mr. Yachi** (Japan) said that the codification of international law was now an integral part of the lawmaking process of the international community. Enormous progress had been made since the United Nations had established the Commission. Lately, however, critical views had been expressed concerning the stagnation of the Commission's codification work. In his Government's view, such criticism was misplaced. International law remained underdeveloped in many areas. Even in the fields that were well covered by legal instruments, attention must be paid to the need for possible review. The Commission needed to cooperate closely with various bodies having lawmaking responsibilities, one of which was the Committee.

48. Turning to chapter VII of document A/54/10, he said that his Government was concerned about the situation of State practice with regard to State immunity. It was recognized that States enjoyed immunity from foreign jurisdiction for acts of sovereign authority and that immunity did not apply to their commercial activities. However, the modalities of such restrictive immunity varied considerably, depending on the legal tradition of the forum State. Several States had enacted domestic legislation to re-establish coherence in their jurisprudence with regard to State

immunity. Such domestic legislation constituted a very significant contribution to the development of the law in that area. It was not, however, the ultimate solution to providing an international standard in the practice relating to State immunity. The question was how to establish basic international rules governing modalities of State immunity at a time when most countries were shifting to a restrictive doctrine of immunity. The Committee should therefore resume substantial discussions on the draft articles on jurisdictional immunities of States and their property in the next few years with a view to adopting the draft articles in the form of a convention.

49. His delegation welcomed the Commission's adoption of the draft articles on nationality of natural persons in relation to the succession of States (A/54/10, ch. IV), which struck the proper balance between the right of an individual to obtain nationality and the right of the State to grant nationality. His delegation supported the Commission's recommendation to the General Assembly that the draft articles should be adopted in the form of a declaration and that, with the adoption of those draft articles, the Commission's work on the topic should be considered concluded.

50. Lastly, his delegation welcomed the Commission's initiative in the field of international environmental law. In formulating general rules on the topic, the Commission should refine the scope of its work and choose specific themes.

51. **Mr. Westdickenberg** (Germany), referring to the draft articles on nationality of natural persons in relation to the succession of States, adopted on second reading by the Commission, said that his delegation supported the few changes made in the draft articles since the first reading in 1997. It had been a good idea to reposition former article 27 as article 3 to conform with the two Vienna Conventions on Succession of States. The substitution of the words "concern the international community" for the words "are of concern to the international community" in the first preambular paragraph was advantageous, since the phrase "of concern" had been given a special meaning in relation to crimes defined under the Rome Statute of the International Criminal Court. His Government also welcomed the change made in the present article 7 (formerly article 6) to limit the retroactive effect of the article to situations where the persons concerned would otherwise be stateless.

52. His delegation supported the recommendation to the General Assembly that it should adopt the draft articles in the form of a declaration. In his Government's view, the Commission had completed its work on the topic, and there was little practical value in its taking up the question of the nationality of legal persons.

53. With regard to jurisdictional immunities of States and their property, his delegation would like to comment on the five main issues the Commission had reviewed. In defining the concept of a State, it was very difficult to know how to deal with the constituent units of a federal State and political subdivisions of the State. The wording suggested by the Working Group for article 2, paragraph 1 (b), attributing to the State the conduct of entities exercising governmental authority (A/54/10, annex, para. 30), might be a way to harmonize the concept of the State for purposes of immunity with that for purposes of State responsibility and was worth considering.

54. His delegation concurred with the view that the distinction between the so-called nature and purpose tests for determining the commercial character of a contract or transaction was not likely to be significant in practice; it supported the elimination of references to nature and purpose tests in the text. On the question of State enterprises, his delegation supported the short wording for article 10, paragraph 3, suggested by the Working Group. In relation to contracts of employment, his delegation believed that the best way to deal with the issue raised with respect to article 11, paragraph 2, of the draft articles was to provide a non-exhaustive list of employees performing functions in the exercise of governmental authority.

55. The question of measures of constraint against State property was delicate and complex and required more work. The distinction between prejudgement and post-judgement measures might be useful. A role for international dispute settlement should be provided. The General Assembly might also decide to leave the issue to State practice.

56. Recent developments in State practice and legislation had shown that the issue of jurisdictional immunity in the case of violations by acts of States of human rights norms having the character of *jus cogens* was central to the subject of jurisdictional immunity and deserved further attention.

57. His Government would like to see future work on jurisdictional immunities take the form of a model law. The topic could then be revisited by the General Assembly at its fifty-sixth session.

58. **Mr. Rebagliati** (Argentina) said that in order for the Commission's work on the codification of international law to be truly effective, it must ultimately take the form of multilateral conventions. The fact that many such conventions were not entering into force for lack of ratification had led the Commission to formulate instead

principles, guidelines or model laws, in other words, "soft law". Although that approach might in some cases be appropriate, the main thrust should be to systematize customary law into legally binding instruments.

59. His delegation attached great importance to maintaining and deepening relations between the Commission and related institutions, particularly the International Court of Justice, whose opinions and judgements played a fundamental role in identifying customary law and developing the principles of international law. The Commission could also benefit from closer relations with the International Tribunal for the Law of the Sea and the regional courts of justice, and it could enrich its codification work through genuine dialogue and a more fluid exchange of information with regional counterparts, such as the Inter-American Juridical Committee, the Asian-African Legal Consultative Committee and the European Committee on Legal Cooperation. Equitable representation, particularly from developing countries, would add to the value of the International Law Seminar held each year in Geneva.

60. With regard to the long-term programme of work of the Commission, the topics proposed (responsibility of international organizations; the effect of armed conflict on treaties; shared natural resources; and expulsion of aliens) met the selection criteria of timeliness, usefulness, codification feasibility and interest to most States. His delegation would therefore ally itself with efforts to ensure that the Commission had the resources it needed to carry out its work.

61. His delegation supported the draft articles on nationality of natural persons in relation to the succession of States. Most of their provisions reflected observed practice and were in keeping with the literature and case law in the field; the articles also reflected the latest developments in international protection of human rights.

62. Although the process of decolonization had been largely completed, there were still colonial situations to which the rules of nationality contained in the articles would apply. Decolonization could take many forms; territories might become independent, unite, or merge with another State. Although, unlike the Vienna Conventions on the Succession of States, the draft articles did not specifically provide for such cases, the principles and rules they contained could cover all the hypotheses mentioned.

63. Argentine legislation was in harmony with all the principles set forth in the draft articles, particularly the right to a nationality, respect for the will of persons concerned, prevention of statelessness, non-discrimination and concern for the unity of the family.

64. His delegation supported the Commission's recommendation that the General Assembly should adopt the draft articles in the form of a declaration and would sponsor a resolution to that effect. A declaration might well be the most readily accepted instrument with the greatest impact on domestic law and practice and influence on bilateral agreements, a first step towards the formation of legal norms.

65. **Mr. Lavalle** (Guatemala) said that if the General Assembly adopted the draft articles on nationality in the form of a declaration, it would be the first declaration adopted by the Assembly on the recommendation of the Commission. There were advantages to adopting the draft articles in that form rather than in the form of a treaty, as had been pointed out by Switzerland in its general remarks contained in document A/CN.4/493.

66. There were few differences between the text currently before the Committee and the one that the Commission had adopted on first reading in 1997. Most of the proposals made by Governments in document A/CN.4/493 had not been accepted. That was regrettable, since many of them were valuable. As a result of the deletion of draft article 19 from the 1997 text, a change which his delegation had proposed, nearly all the provisions of the text were presented as binding. A distinction should be made between provisions of a customary nature and those that would constitute progressive development. Moreover, the provisions having the character of *jus cogens* should be separated from the rest.

67. As indicated in the third paragraph of Greece's general remarks in document A/CN.4/493, as well as in the final paragraph of Guatemala's remarks on article 4 in the same document, the text implicitly established the general rule that a successor State was obligated, in all cases, to attribute its nationality to the persons concerned who, at the time of succession, had their habitual residence in its territory. It was regrettable, therefore, that that rule was not stated expressly in part I of the current draft.

68. Document A/CN.4/493 contained two proposals by Switzerland that should be accepted, especially as they were very easy to implement. They pertained to draft articles 5 and 6 of 1997, which corresponded to draft articles 6 and 7 in the current text.

69. With regard to draft article 13 of 1997, corresponding to draft article 14 of the current text, his delegation agreed with the comments made by France and by Switzerland in document A/CN.4/493. Moreover, as noted by Argentina in its comment on article 20 in the same document, the

application of that article posed the danger that the annexing or acquiring State could not exercise sovereignty in a territory whose inhabitants belonged entirely to another political community.

70. It was regrettable that his delegation's comments on article 20 in document A/CN.4/493 had not been taken into account. His delegation had recommended that the regime established by part II, section 1, of the current draft should, as far as possible, be harmonized with the regime established by part II, section 4. A step had been taken in that direction by making the change in article 20 proposed by the Czech Republic in document A/CN.4/493. His delegation, while satisfied with that change, believed that its suggestions should also have been adopted.

71. His delegation did not see any basic difference between the assumption in section 1 and the assumption in section 2. He invited the Committee to posit the existence of a State A, which had a province called Silvana adjoining State B. He then put forward two hypotheses. Under hypothesis 1, Silvana would become a province of State B without changing its name. Under hypothesis 2, Silvana would become an independent State, again without changing its name. Hypothesis 1 was governed by section 1 and hypothesis 2 by section 4. The regime would therefore be very different depending on which of the two hypotheses was applied.

72. Under hypothesis 1, a succession of States would take place in that Silvana would go from State A to State B. Under hypothesis 2, a succession of States would also take place. In the first case, however, the Government in charge of Silvana's foreign relations, in other words, the Government of State B, would also be in charge of the foreign relations of other territories, while in the second case, the Government in charge of the foreign relations of Silvana would be responsible only for Silvana. Moreover, in the first case, the inhabitants of Silvana, to the extent that they had become nationals or residents of State B, could take up residence not only in any part of the territory of Silvana, but also in any other province of State B, a right which such persons would not enjoy in the second case. He failed to see the justification for that discrepancy. If his delegation's suggestion for eliminating the discrepancy was not adopted, the Commission should at least accept the suggestion made by Switzerland in the last paragraph of its comments on article 20 (A/CN.4/493). In any event, in the application of the declaration it would be appropriate and perhaps necessary to fill the gaps in section 1 by borrowing from the provisions of section 4.

73. Lastly, he proposed drafting changes to the titles of section 1 and 4, to paragraphs 1 and 2 of draft article 8 in the English version, and to the title of draft article 10.

The meeting rose at 3.20 p.m.